

McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030
Phone: 804.775.1000
Fax: 804.775.1061
www.mcguirewoods.com

W. Carter Younger
Direct: 804.775.4363

McGUIREWOODS

wyounger@mcguirewoods.com
Direct Fax: 804.698.2214

May 28, 2004

Via E-Mail to ofccp-public@dol.gov

Mr. Joseph DuBray, Jr.
Director of the Division of Policy, Planning
And Program Development
Office of Federal Contract Compliance Programs
Room C-3325
200 Constitution Avenue, NW
Washington, D.C. 20210

Comments Regarding the Proposed Amendment to 41 CFR Part 60-1

Dear Mr. DuBray:

The comments below are submitted regarding the proposed "Internet applicant" definition, 41 C.F. R. § 60-1.3, on behalf of Siemens, USA. This follows up on, and supplements, oral comments previously expressed by Siemens on Friday, May 21, 2004.

Siemens USA is a very large employer in the United States. Its operating companies employ approximately 65,000 people in all 50 states and Puerto Rico. Worldwide, Siemens' parent company, Siemens AG, headquartered in Germany, and its related and subsidiary entities employ more than 417,000 persons in 192 countries. Some 675 locations in the United States engage in activities that include software development, engineering, manufacturing and system assembly. Siemens is committed to its corporate equal opportunity and affirmative action policies, as well as full compliance with the requirements of Executive Order 11246, and its implementing regulations.

With its extensive U.S. workforce, Siemens processes about 250,000 employment inquiries per year among all of its U.S. business operations. To manage this volume, it is implementing sophisticated computerized systems as part of its recruitment, application and selection process. The Company's process includes the PeopleClick electronic data system and Internet-based application procedures, as well as "traditional" application procedures such as paper applications and resumes submitted by mail and by hand, inquiries at job fairs, employee referrals and other methods. These varied procedures are intended to enable the Company to attract, recruit and employ the broadest range of qualified individuals, while complying with its equal opportunity and affirmative action commitments and striving to achieve an efficient, cost-effective means of meeting the employment needs of its business operations.

As a major employer, Siemens USA has a significant interest in the definition of "applicant" recently announced jointly by the Uniform Guidelines on Employee Selection Procedures ("UGESP") Agencies, including the Department of Labor and the Equal Employment Opportunity Commission. Specifically, the implementation of the joint announcement of the UGESP Agencies as reflected in the Equal Employment Opportunity Commission's "Questions

and Answers: Definition of 'Job Applicant' for Internet and Related Electronic Technologies" ("EEOC Q&As") and the Office of Federal Contract Compliance Programs' proposed rule pursuant to 41 C.F.R. Part 60-1 to define "Internet Applicant," as published in the Federal Register on May 29, 2004 ("OFCCP Definition") will have a direct and substantial impact on the Company's application and recordkeeping processes.

The Company appreciates OFCCP's efforts to address the challenges faced by employers and individuals seeking employment in light of new technologies used in recruiting and hiring, such as Internet, e-mail, websites and databases. The proposals made in the OFCCP Definition to address these challenges are helpful, but they do raise questions and concerns. Employers that, like Siemens, provide multiple avenues for persons to express an interest in employment, using both "old" and "new" technologies, face great difficulty in dealing with differing definitions of an "applicant" that depend on the medium by which the interest is expressed. Moreover, they are challenged to comply with potentially conflicting definitions announced by the two principal federal EEO enforcement agencies.

OFCCP's proposed Definition sets out a four-factor test:

"Internet Applicant" means any individual who:

- (i.) Submits an expression of interest in employment through the Internet or related electronic data technologies;*
- (ii.) The employer considers the individual for employment in a particular open position;*
- (iii.) The individual's expression of interest indicates the individual possesses the advertised, basic qualifications for the position;*
- (iv.) The individual does not indicate that he or she is no longer interested in employment in the position for which the employer has considered the individual."*

By comparison, the EEOC Q&As state three criteria for an individual to be considered an applicant *"in the context of the Internet and related electronic data processing technologies"*:

- (i.) "The employer has acted to fill a particular position;*
- (ii.) The individual has followed the employer's standard procedures for submitting an application; and*
- (iii.) The individual has indicated an interest in the particular position."*

(EEOC Q&A 8). The EEOC's criteria do not include OFCCP's proposed requirement that the individual's expression of interest indicate that he or she possesses the "advertised, basic qualifications" for the position.

Both the OFCCP and the EEOC would require employers to follow different recordkeeping procedures for "traditional" applications than those they may adopt for "Internet"

applications. The EEOC Q&As state that *"for those positions subject to traditional recruitment and selection techniques, the existing recordkeeping standards apply. For those positions subject to Internet/electronic recruitment and selection techniques, the new recordkeeping standards apply."* The OFCCP's request for comments similarly states that *"[t]he proposed rule creates differing standards for data collection for traditional applicants versus Internet Applicants for the same job. Accordingly, if an employer's recruitment processes for a particular job involving both electronic data technologies, such as the Internet, and traditional wants ads and mailed paper submissions, the proposed rule would treat these submissions differently for that particular job."* The OFCCP notes appropriately: *"We are unsure whether this dual standard will provide OFCCP with meaningful contractor data to access and determine whether to commit agency resources into an investigation of the contractor's employment practices. Therefore, OFCCP expressly solicits comments on this issue."*

Siemens USA submits the following comments about the OFCCP Definition:

1. The OFCCP Definition includes the requirement that an individual's expression of interest must indicate that he or she possesses the *"advertised basic qualifications"* for the position, which OFCCP defines as *"qualifications that the employer advertises (e.g., posts a description of the job and necessary qualifications on its website) to potential applicants that they must possess to be considered for the position."* This recognizes that employers must have the ability to establish and utilize qualifications in order to recruit and hire the persons it needs for its workforce. This is especially true today, when globalization and technology allow companies to locate jobs wherever they can hire qualified individuals who have the skills and ability to meet the employer's needs for cost-effectiveness and quality.

While the *"advertised basic qualifications"* (or "minimum qualifications") concept must of necessity be recognized by the EEOC, this is not made clear by EEOC's Q&As. As a federal contractor, Siemens (like other similarly-situated employers) is subject to the UGESP and both the EEOC and OFCCP definitions of "applicant." The employer's ability to establish minimum qualifications, and to require that an individual must at least possess those established qualifications in order to be considered a bona fide applicant, should be expressly and consistently stated by all UGESP agencies to avoid confusion and inconsistent enforcement.

However, there are potential problems that arise from the term "advertised." This may put undue emphasis on the drafting of the initial announcement of the vacancy and qualifications. For example, the employer may have to narrow the initial "advertised" qualifications for search purposes if the basic qualifications as initially "advertised" produce too many potential applicants in the pool for all individuals to be actually considered. Similarly, if the initial "advertised" qualifications are too restrictive, and do not produce a sufficient pool of applicants, they may have to be broadened. Thus, there is a problem if the employer is "locked in" to its first "advertised" articulation of qualifications. Siemens suggests eliminating the term "advertised."

2. The meaning of the term "considers" in relation to an application is subject to conflicting interpretation. Siemens USA, like other large employers, may receive thousands of resumes or "hits" on a data search for a particular vacancy. The Company's recruiters often must make multiple cuts in order to reach a manageable number of individuals before actually evaluating anyone for employment. For example, a recruiter may make an initial electronic

database search and identify 1,000 resumes of persons who have expressed an interest in a posted job and who superficially process the "advertised basic qualifications." No recruiter can realistically consider the merits of 1,000 individuals. Additional data cuts will be required in order to cull this group to a manageable number of individuals whose qualifications will actually be evaluated on their merits by the recruiter or hiring manager. This initial culling process should not be deemed "consideration" of the applicant.

Using the hypothetical pool 1000 individuals who expressed interest in an advertised position as an example, the initial pool may be narrowed by 975 to reach a group of 25 applicants who actually are evaluated on their individual merits by the recruiter or hiring manager. This is the first stage at which the employer actually "considers" the applicant. OFCCP's regulatory definitions and recordkeeping obligations should be conformed with this workplace reality. Enforcement agencies should focus on the decision-making stage, when the recruiter or hiring manager evaluates an actual applicant against the employer's requirements and makes a judgment as to which individuals should continue in the process. The data on the other 975 resumes in the example above would still be stored for two years and, in the event of an audit or charge, would be available electronically for the Agency to evaluate any adverse impact of the criteria that preceded the actual evaluation for employment.

If OFCCP is concerned that this approach provides too much latitude to employers, it could be restricted, for example, to situations where the final "applicant" pool being considered contains a reasonable minimum number, such as 25. The definition could also state that, in any event, the employer must at least identify as "applicants" all individuals who are in the final pool or group from which the recruiter or hiring manager selects individuals for interviews.

3. The definition of "Internet and related electronic technologies" is unclear. For example, if a resume is received on paper through the mail but is not actually considered until after it is recorded electronically or scanned into a database, is the resume an "expression of interest in employment through the Internet or related electronic technologies" or is it a traditional application? What if the same resume is sent by fax, which is then displayed on the computer terminal of the employer's recruiter? Is this an "Internet applicant" or a "traditional applicant?" Siemens suggests that persons seeking employment should not be treated differently simply because one has access to a computer, one to fax and one only to the U.S. Mail, at least if these applications are all reviewed electronically at the time they are considered.

4. Employers should not be faced with the burden of dual tracking and recordkeeping processes, one for "traditional" applications and another for applications submitted online or by e-mail. This will result in inconsistent and burdensome layers of recordkeeping and reporting.

The method used by an individual to indicate his or her interest in employment should not determine a contractor's recordkeeping obligations. It makes no sense to deem someone an applicant, without regard to their basic qualifications, simply because of the format in which they submit their expression of interest. OFCCP's proposed approach invites confusion and misstates the true relative status of the individual in the hiring process. Moreover, with two different definitions and two different tracking and recordkeeping processes for the employer, the OFCCP would be unable to review the employer's application and hiring process on a

rational "apples to apples" basis. This inability to replicate the employer's actual decision-making process would frustrate a compliance review rather than facilitate it.

Ultimately, differing definitions may force employers to refuse to accept paper or other "traditional" forms of application, and to require all expressions of interest in employment to be made by e-mail, online or through electronic technology. This could reduce the availability of employment opportunities to many potentially good candidates, who may not have ready access to computers or the Internet. It could also disadvantage small employers that may not have the funds to implement sophisticated electronic technology.

Siemens USA suggests the following to address these concerns:

a. **Apply the same criteria to "traditional" applicants that are proposed to apply to "Internet Applicants."** The employer is comparing individuals of like credentials when it is making a decision, without regard to the route by which the credentials were placed before the employer for consideration. OFCCP should not impose different obligations on the employer for one route of expression than for another if the employer does not treat them differently when considering the individual for employment. For the employer to be required to treat one of the individuals as an "applicant" simply because he or she submitted a form on paper and another individual as being not an "applicant" because he or she submitted the form electronically serves no purpose and only invites confusion. The employer will not select a "traditional" applicant who does not possess the needed qualifications over an Internet Applicant who does possess such qualifications. There will be meaningless recordkeeping burdens on the employer, and the statistics of the employer's applicant flow and selection decisions will be misleading when reviewed by the OFCCP for compliance with E.O. 11246. The OFCCP will be faced with statistics that do not meaningfully reflect the employer's actual selection decision among persons meeting its minimum standards. Both "traditional" applicants and "Internet Applicants" should be evaluated under the same "basic qualifications" standards.

b. **Apply the "applicant" test at the actual consideration stage, when the employer is evaluating the potential applicant for a specific position and making a decision whether to move a specific individual forward in the selection process.** Remove the focus from the intake stage, when the individual's expression of interest first occurs. The first part of OFCCP's four-factor definition of "Internet applicant" focuses on the form in which an expression of interest is submitted, not the form in which it is considered. Siemens recommends that there be no distinction between Internet and traditional expressions of interest. If OFCCP remains committed to differing treatment, however, at minimum the "Internet and related technologies" test should not be applied until the consideration stage, when the expressions of interest are actually evaluated.

For example, if an employer like Siemens receives paper resumes, faxes and Internet-based expressions of interest, and enters everything into the same electronic data base before considering them, the same rule should apply to all expressions of interest that are pulled from the data base for consideration. When the expressions of interest in the database are identified in a search, evaluated and compared with the requirements of the specific position, the same standards should apply to all individuals under consideration for that specific position at that time, without regard to the route by which the individual's expression of interest arrived in the database. This could be accomplished with a simple change to the proposed definition. The

word "submits" in § 60-1.3 (1)(i) should be eliminated and the language changed to read "(i) is considered for employment through the use of the Internet or related electronic data technologies."


c. **Recognize the need of employers to narrow a large pool of electronically identified potential applicants.** Employers must be able to identify a group that is small enough for actual evaluation by the recruiter or hiring manager. This process may, for example, ultimately result in a group of 30 resumes that are actually evaluated by the recruiter before being forwarded to a hiring manager for consideration for potential interviews. Only the individuals whose qualifications are actually evaluated for being moved forward in the process should be deemed "applicants."

This issue could be addressed by an explanation of the meaning of the term "considers." For example: *"An employer 'considers' an applicant when a recruiter or hiring manager evaluates the applicant's qualifications against the employer's requirements for the specific vacancy. The term 'considers' is not intended to include the preliminary narrowing process by which a large pool of potential applicants is narrowed by computer or other sorting techniques to produce a manageable pool of individuals for evaluation."*

Siemens USA strongly encourages the OFCCP, and all other UGESP Agencies, to apply the same standards to all persons expressing interest in employment regardless of the "old technology" or "new technology" method of such expression; to recognize that employers must be able to establish "basics" or "minimum" qualifications, and to define "applicant" at the stage at which an individual is actually evaluated for employment in a specific position that is being filled.

Siemens USA appreciates the opportunity it has been accorded to submit comments on the proposed regulations. It would be happy to provide further input based on its extensive experience with both traditional and Internet-based application technologies, if that would be helpful.

Respectfully submitted,



W. Carter Younger

/kat